

FCC MAIL SECTION

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DISPATCHED BY MM Docket No. 92-195

In the Matter of

Amendment of Section 73.202(b),	RM-7091
Table of Allotments,	RM-7146
FM Broadcast Stations.	RM-8123
(Beverly Hills, Chiefland,	RM-8124
Holiday, Micanopy and	
Sarasota, Florida) ¹	

REPORT AND ORDER (Proceeding Terminated)

Adopted: March 9, 1993; Released: March 29, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding proposing the substitution of Channel 246C3 for Channel 246A at Beverly Hills, Florida, and the modification of the construction permit of Station WXOF (formerly WPDS), Beverly Hills, Florida, to specify operation on Channel 246C3, 7 FCC Rcd 5910 (1992). Sarasota-FM, Inc. and Gator Broadcasting Corporation ("Sarasota-FM/Gator") filed joint comments and reply comments.² Heart of Citrus, Inc. ("Heart of Citrus"), permittee of Station WXOF, filed comments and reply comments. Pasco Pinellas Broadcasting Co. ("Pasco Pinellas"), Highlands Media Company, Inc., Roper Broadcasting, Inc., WGUL-FM, Inc., and White Construction Co., Inc. filed reply comments. For the reasons discussed below, we are upgrading Station WXOF, Beverly Hills, Florida, to Channel 292C3; Station WRRX, Micanopy, Florida, to Channel 247C2; Station WLVU, Holiday, Florida, to Channel 246C2; and Station WSRZ, Sarasota, Florida, to Channel 293C2. In order to accommodate these action, we are also modifying the construction permit of Station WLOH, Channel 247A, Chiefland, Florida, to specify operation on Channel 300A.

Background

2. This proceeding began with the filing of a petition for rule making by Heart of Citrus, permittee of Station WXOF, Beverly Hills, Florida, proposing the substitution of Channel 246C3 for Channel 246A at Beverly Hills, and modification of its construction permit to specify operation on Channel 246C3. In response to the *Notice*, we received two counterproposals.³ The first was filed jointly by Sarasota-FM/Gator. That counterproposal proposed an alternate substitution of Channel 292C3 for Channel 246A at Beverly Hills; the alternate substitution of Channel 246C2 for Channel 292A at Holiday, Florida, and modification of the license of Station WLVU, Holiday, to specify operation on Channel 246C2;⁴ and the substitution of Channel 300A for Channel 247A at Chiefland, Florida, and modification of the construction permit of Station WLOH, Chiefland, to specify operation on Channel 300A. In turn, these channel substitutions would permit the substitution of Channel 293C2 for Channel 292A at Sarasota, and modification of the license of Station WSRZ to specify operation on Channel 292C2; and the substitution of Channel 247C2 for Channel 249A at Micanopy, and modification of the license of Station WRRX to specify operation on Channel 247C2. The second counterproposal was filed by Heart of Citrus proposing the substitution of Channel 246C2 for Channel 246A at Beverly Hills, and modification of its construction permit to specify operation on Channel 246C2.

Beverly Hills, Florida

3. There are three Beverly Hills upgrade proposals before us. The first two, Channel 246C3 and Channel 246C2, were advanced by Heart of Citrus. The third proposal, Channel 292C3, was advanced by Sarasota-FM/Gator.⁵ A Channel 292C3 upgrade at Beverly Hills instead of Channel 246C2 or Channel 246C3 would accommodate the Channel 247C2 upgrade at Micanopy and the Channel 246C2 upgrade at Holiday. In turn, a Channel 246C2 upgrade at Holiday makes possible the Channel 293C2 upgrade at Sarasota. On the other hand, any upgrade on Channel 246 at Beverly Hills precludes upgrades at both Micanopy and Sarasota. As a consequence, it is necessary to consider the public interest benefits of a Class C2 upgrade at Beverly Hills versus the proposed upgrades at Micanopy and Sarasota. These conflicting proposals are comparatively considered under the Commission's guidelines set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In comparing conflicting proposals, the priorities are as follows:

- (1) First full-time aural service
- (2) Second full-time aural service

¹ The communities of Chiefland, Holiday, Micanopy and Sarasota, Florida, have been added to the caption.

² Sarasota-FM, Inc. is the licensee of Station WSRZ, Channel 292A, Sarasota, Florida, and Gator Broadcasting Corporation is the licensee of Station WRRX, Channel 249A, Micanopy, Florida.

³ Public Notice was given on November 20, 1992 (Report No. 1918).

⁴ In MM Docket No. 87-455, we are currently considering a Channel 292C2 upgrade for Station WLVU.

⁵ As noted earlier, Sarasota-FM/Gator proposed the Channel

292C3 upgrade at Beverly Hills in conjunction with a Channel 246C2 upgrade at Holiday, Florida (instead of the Channel 292C2 upgrade being considered for Station WLVU in MM Docket No. 87-455). With respect to Beverly Hills and Holiday, this proposal is an "incompatible channel swap" as envisioned in *Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channel*, 60 RR 2d 114,120 (1986). See *Holiday, Florida*, 7 FCC Rcd 2557 (1992); see also *Clincho, Virginia* 6 FCC Rcd 3732 (1991). As such, these nonadjacent channel upgrades may be granted without opening either proposed upgraded allotment to other expressions of interest.

- (3) First local service
- (4) Other public interest matters
- (Co-equal weight is given to priorities (2) and (3))

4. A Class C3 facility at Beverly Hills will serve approximately 198,750 persons. Compared to the existing Class A authorization of Station WXOF, this represents a net gain of 89,966 persons. On the other hand, the proposed Class C2 upgrade at Beverly Hills will serve approximately 322,428 persons representing a net gain of 213,636 persons. In regard to the population receiving additional service, Heart of Citrus claims that a Class C2 upgrade at Beverly Hills will provide a third aural service to 2,162 persons and a fourth aural service to 8,005 persons. In contrast, a Class C3 upgrade will provide a third aural service to 2,162 persons and a fourth aural service to only 7,443 persons. In comparison, the proposed upgrade for Station WRRX at Micanopy will provide a net service gain of 117,867 persons and the proposed upgrade for Station WSRZ at Sarasota will provide a net service gain of 773,448 persons.

5. After careful consideration of this matter, we believe that the public interest would be best served by upgrading Station WXOF, Beverly Hills, Florida, to specify operation on Channel 292C3.⁶ A Class C3 upgrade at Beverly Hills enables us to grant upgrades at both Micanopy and Sarasota. In this connection, we believe that upgrading Station WRRX in Micanopy to specify operation on Channel 247C2 and Station WSRZ in Sarasota to specify operation on Channel 293C2 would both be in the public interest.⁷ These latter two upgrades represent a net service gain of 891,315 persons compared to a net service gain of 213,636 persons if we were to grant a Class C2 upgrade to Beverly Hills instead of the Class C3 upgrade. Under priority four, above, the upgrades at Micanopy and Sarasota are favored over a Class C2 upgrade at Beverly Hills because of the population differential of over 677,000 persons. In the present situation, we are aware that approximately 562 additional persons would have received a fourth aural service if we were to upgrade Station WXOF to a Class C2 facility. It is our view that a fourth aural service to an additional 562 persons does not override the substantial public interest benefit of new FM reception services to over 677,000 persons. See *Benton and Dardanelle, Arkansas*, 7 FCC Rcd 2555 (1992); cf. *Christian Broadcasting of Midlands, Inc.*, 99 FCC 2d 578 (1984).

6. Heart of Citrus filed reply comments directed against the Sarasota-FM/Gator counterproposal looking toward a Channel 292C3 upgrade at Beverly Hills instead of its preferred Channel 246C2 upgrade. In addition to the arguments concerning third and fourth aural services discussed above, Heart of Citrus contends that the proposed site, 19.9 kilometers (12.4 miles) south of Beverly Hills, for

the Channel 292C3 upgrade is "within a platted residential subdivision and is not available for tower construction." As such, Heart of Citrus argues that any alternate site further from Beverly Hills will preclude the requisite 70 dBu principal city service required by Section 73.315(a) of the Rules. We will not deny a Channel 292C3 upgrade at Beverly Hills on the basis of this unsupported allegation. It continues to be our view that in a rule making proceeding to allot an FM channel, there must be a theoretical site which meets the Commission's various technical rules. See e.g., *Randolph and Brandon, Vermont*, 6 FCC Rcd 1760, 1764 n.4 (1991); see also *Key West, Florida*, 3 FCC Rcd 6423 (1988). As long as such a site is shown to exist, we will typically presume at the allotment stage that it is theoretically available and will use it as a basis for making the allotment. However, we will take into account a showing by a party that, in reality, no theoretical site exists because of environmental, zoning, air hazard or other similar considerations. In this case, Heart of Citrus did not make such a showing. Even assuming that the proposed site is within a "platted residential subdivision," there is no indication as to the size of this area or the unavailability of a suitable site outside of this area, or a showing that a local zoning authority would not approve the construction of a tower.⁸

Holiday and Chiefland, Florida

7. In order to accommodate the upgrades at Beverly Hills, Micanopy, and Sarasota, it is necessary to make related channel substitutions at Holiday, Florida, and Chiefland, Florida. In regard to Holiday, we note that in MM Docket No. 87-455, we are currently considering a proposal by Pasco Pinellas Broadcasting Company, licensee of Station WLVU, Channel 292A, Holiday, Florida, proposing the substitution of Channel 292C2 for Channel 292A at Holiday and modification of the Station WLVU license to specify operation on Channel 292C2. As discussed in paragraph 2, *supra*, Sarasota-FM/Gator proposed an alternative Channel 246C2 upgrade for Station WLVU. The Sarasota-FM/Gator counterproposal in this proceeding has three benefits. First, it enables us to upgrade Station WLVU to a Class C2 facility and resolve MM Docket No. 87-455. As an "incompatible channel swap" in conjunction with the proposed Channel 292C3 upgrade for Beverly Hills, we are able to upgrade Station WLVU to Channel 246C2 without entertaining other expressions of interest in the upgraded allotment. Second, a Channel 246C2 upgrade at Holiday enables us to upgrade Station WXOF in Beverly Hills to Channel 292C3 which, in turn, enables us to upgrade Station WRRX in Micanopy to Channel 247C2. Third, a Channel 246C2 upgrade at Holiday enables us to upgrade Station WSRZ in Sarasota to Channel 293C2. Along with the three other upgrades in this proceeding, we believe that

⁶ The reference coordinates for the Channel 292C3 allotment at Beverly Hills, Florida, are 28-44-09 and 82-29-56. This site is 19.9 kilometers (12.4 miles) south of Beverly Hills. Inasmuch as the principal city service contour of a Class A FM station will extend 23.2 kilometers (14.4 miles), this allotment will provide principal city service to Beverly Hills. Because the petition for rule making which resulted in this allotment was filed prior to October 2, 1989, Heart of Citrus, Inc., may avail itself of the provisions of Section 73.213(c)(1) of the Rules with respect to Station WEAG, Channel 292A, Starke, Florida.

⁷ The reference coordinates for the Channel 247C2 allotment at Micanopy, Florida, are 29-38-55 and 82-25-30. This site is 21.1

kilometers (13.1 miles) northwest of Micanopy. The reference coordinates for the Channel 293C2 allotment at Sarasota, Florida, are 27-27-49 and 82-40-01. This site is 19.4 kilometers (12.1 miles) northwest of Sarasota.

⁸ Heart of Citrus also argues that the Sarasota-FM/Gator counterproposal should not be considered because Pasco Pinellas, licensee of Station WLVU in Holiday, has not consented to a Channel 246C2 upgrade. In this regard, we note that Pasco Pinellas has requested a Channel 292C2 upgrade in MM Docket No. 87-455, and has filed reply comments in this proceeding supporting the proposed Channel 246C2 upgrade. As a consequence, the Heart of Citrus argument is not well taken.

the public interest would be served by upgrading Station WLUV in Holiday, Florida, to specify operation on Channel 246C2.⁹

8. We are substituting Channel 300A for Channel 247A at Chiefland, Florida, and modifying the license of Station WLOH, Chiefland, to specify operation on Channel 300A.¹⁰ This channel substitution enables Station WRRX to upgrade to Channel 247C2. White Construction Co., Inc., licensee of Station WLOH, filed reply comments in this proceeding consenting to its proposed channel substitution. These reply comments also expressed a concern with a potential difficulty in obtaining reimbursement from Gator for the costs of changing the Station WLOH channel. As the beneficiary of this substitution, Gator will be required to reimburse White Construction Co., Inc. for the reasonable expenses of changing its channel. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). In view of the fact that Gator has stated its willingness to meet this requirement, we believe, based on our previous experience, that any issue as to the amount of reimbursement can be resolved by the parties without Commission intervention.

Other Matters

9. Sarasota-FM/Gator also advanced two alternative proposals concerning Beverly Hills which are not being considered in this proceeding. The first alternative is identical to the Sarasota-FM/Gator counterproposal except for a proposed substitution of Channel 292A for Channel 246A at Beverly Hills. In this proceeding, we believe that a Class C3 facility at Beverly Hills would provide a greater public interest benefit. Accordingly, a Channel 292A substitution is not being considered. The second rejected alternative involves upgrading Station WXOF to Channel 292C3 and reallocating the channel to either Inverness or Sugarmill Woods, Florida. This proposal was filed pursuant to the provisions of Section 1.420(i) of the Commission's Rules which provides for the reallocation of a channel to a new community and modification of the license or construction permit to reflect the new community. *See Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License")*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). In addition to the fact that Heart of Citrus has specifically disavowed any interest in changing the community of license for Station WXOF, there is no provision in Section 1.420(i) of the Rules or *Community of License* for a third party to propose a change in community of license. As such, there is no basis to consider the second alternative.

10. Highlands Media Company, Inc., Roper Broadcasting, Inc., and WGUL-FM, Inc. filed reply comments raising identical concerns. These parties are proponents of proposals awaiting the outcome of a pending rule making proceeding in MM Docket No. 87-455. *See Order to Show Cause* in MM Docket No. 87-455, 7 FCC Rcd 2642 (1992). After noting that both Sarasota-FM and Gator filed defec-

tive and untimely proposals in MM Docket No. 87-455, these parties argue that the Sarasota-FM/Gator counterproposal in this proceeding is an effort to "bootstrap their way out of the consequences of their earlier errors." In view of the fact that MM Docket No. 87-455 is older and "ripe" for resolution, these parties contend that MM Docket No. 87-455 should be resolved prior to resolution of this proceeding. We will not grant the requested relief. Sarasota-FM/Gator filed a valid counterproposal in this proceeding enabling us to grant four upgrades of existing stations. We believe that each upgrade provides significant public interest benefits. In regard to MM Docket No. 87-455, there are two remaining matters that have not been resolved. The first involves a proposal to upgrade Station WLUV to Class C2 status. The second is an Application for Review filed by Sarasota-FM directed against the denial of its proposal to upgrade Station WSRZ to Channel 293C2. Inasmuch as we are upgrading both of these stations to Class C2 status in this proceeding, we will be able to expeditiously terminate MM Docket No. 87-455.

11. We are also taking this opportunity to take a related administrative action. On August 30, 1989, Gator filed a petition for rule making looking toward a Channel 247C2 upgrade for Station WRRX (RM-7091). In order to accommodate this upgrade, Gator proposed the substitution of Channel 246C2 for Channel 292A at Holiday, the substitution of Channel 292A for Channel 246A at Beverly Hills, and the substitution of Channel 300A for Channel 247A at Chiefland. In view of our action in this proceeding upgrading Station WRRX to specify operation on Channel 247C2, we are dismissing this petition for rule making as moot.

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 10, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below to read as follows:

Community	Channel No.
Beverly Hills, Florida	292C3
Chiefland, Florida	300A
Holiday, Florida	246C2
Micanopy, Florida	247C2
Sarasota, Florida	273C, 288A, 293C2

13. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Report and Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Ranch and Grove Holding Corporation, Station KA2XXZ, 1675 Buena Vista Drive, Lake Buena Vista, Florida 32830.

⁹ The reference coordinates for the Channel 246C2 allotment at Holiday, Florida, are 28-16-51 and 82-42-52. This site is 10.6 kilometers (6.6 miles) north of Holiday.

¹⁰ The reference coordinates for the Channel 300A allotment at Chiefland, Florida, are 29-31-00 and 82-53-11. This site is 5.1 kilometers (3.2 miles) northwest of Chiefland. This is the current site of licensed Channel 247A facilities of Station WLOH. In this regard, we note that experimental broadcast Station KA2XXZ operates in Columbia, Florida, on Channel 300A at an

effective radiated power of 250 watts. The Station KA2XXZ operation on Channel 300A would cause objectional interference to Channel 300A operation at Chiefland. This authorization, originally granted December 20, 1988, was expressly subject to summary rescission or modification without prior notice, right to hearing or any procedural recourse. As such, it will be necessary for Station KA2XXZ to terminate operation on Channel 300A upon commencement of operation on Channel 300A by Station WLOH.

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Heart of Citrus, Inc., for Station WXOF, Beverly Hills, Florida, IS MODIFIED to specify operation on Channel 292C3 in lieu of Channel 246A, subject to the following conditions:

- (a) Within 90 days of the effective date of this *Order*, the permittee shall submit a minor change application for construction permit (FCC Form 301) specifying the new facility.
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 1.1620 of the Commission's Rules.
- (c) Nothing contained herein shall be construed to authorize a change in transmitter site or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Pasco Pinellas Broadcasting, Inc., for Station WLWU, Holiday, Florida, IS MODIFIED to specify operation on Channel 246C2 in lieu of Channel 292A, subject to the following conditions:

- (a) Within 90 days of the effective date of this *Order*, the licensee shall submit a minor change application for construction permit (FCC Form 301) specifying the new facility.
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 1.1620 of the Commission's Rules.
- (c) Nothing contained herein shall be construed to authorize a change in transmitter site or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Gator Broadcasting Corporation for Station WRRX, Micanopy, Florida, IS MODIFIED to specify operation on Channel 247C2 in lieu of Channel 249A, subject to the following conditions:

- (a) Within 90 days of the effective date of this *Order*, the licensee shall submit a minor change application for construction permit (FCC Form 301) specifying the new facility.
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 1.1620 of the Commission's Rules.
- (c) Nothing contained herein shall be construed to authorize a change in transmitter site or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

17. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Commissions Act of 1934, as amended, the license of Sarasota-FM, Inc., for Station WSRZ, Sarasota, Florida, IS MODIFIED to specify operation on Channel 293C2 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 1.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter site or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

18. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of White Construction Co., Inc., for Station WLOH, Chiefland, Florida, IS MODIFIED to specify operation on Channel 300A in lieu of Channel 247A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the above authorization for Station WLOH except for the channel as specified above. Any other change, except those specified under Section 73.1260 of the Commission's Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Commission's Rules, PROVIDED the transmission facilities comply in all respects to the station's authorization except for the channel as specified above, and a license application is filed within 10 days of commencement of program tests.

19. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Gator Broadcasting Corporation, licensee of Station WRRX, and Sarasota-FM, Inc., licensee of Station WSRZ, are required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

20. IT IS FURTHER ORDERED, That the counter-proposal filed by Heart of Citrus, Inc. (RM-8123) IS DENIED.

21. IT IS FURTHER ORDERED, That the petition for rule making filed by Gator Broadcasting Corporation (RM-7091) IS DISMISSED as moot.

22. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

23. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
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